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War-Risk, Hijacking & Terrorism Exclusions in Aviation Insurance: Carrier Liability in the Wake of September 11, 2001

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WAR-RISK, HIJACKING & TERRORISM EXCLUSIONS IN AVIATION INSURANCE: CARRIER LIABILITY IN THE WAKE OF SEPTEMBER 11, 2001

ERWIN E. CABAN*

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I. INTRODUCTION

A. SEPTEMBER 11, 2001

ON SEPTEMBER 11, 2001 and the ensuing weeks and months ahead, newspaper headlines conveyed the story:

“In the worst terrorist attack in U.S. history, hijackers flew two airliners into the World Trade Center today, collapsing both towers into flaming rubble, and crashed another aircraft at the Pentagon, shutting down the government and financial markets

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and spreading fear throughout America.”¹ “Hours later, a fourth airliner. . .went down in western Pennsylvania.”² “The toll of dead or injured was expected to climb into the thousands.”³ “In a matter of just a few minutes, the nation’s largest city and the nation’s capital had been plunged into an unimaginable disaster.”⁴

“Hijackers rammed jetliners into each of New York’s World Trade Center towers yesterday, toppling both in a hellish storm of ash, glass, smoke and leaping victims, while a third jetliner crashed into the Pentagon in Virginia.”⁵ “There was no official count, but President Bush said thousands had perished, and in the immediate aftermath the calamity was already being ranked the worst and most audacious terror attack in American history.”⁶

“A stunning multipronged terrorist attack struck the United States today as hijacked airplanes plowed into both giant towers of the World Trade Center in New York and the Pentagon in Washington.”⁷ “The clearly coordinated attacks appeared to be the most broad-scale act of violence on the nation since the Japanese attack on Pearl Harbor in 1941.”⁸

“Responding to what one U.S. senator termed a ‘second Pearl Harbor,’ U.S. officials grappled with how to respond to an enemy who was not immediately identified, although speculation was rampant. As smoke from the attacks hung over New York City and Washington, the realization set in that the country may be in the extraordinary position of being at war – yet without a clear target for counter-attack.”⁹

“Adding to the industry’s global woes, a brief communiqué from the Lloyd’s Aviation Underwriters Association of London yesterday has plunged the world’s airlines into a new crisis.

¹ Geraldine Baum & Maggie Farley, *Terrorism Hits the U.S.: Terror Attack*, L.A. TIMES, Sept. 11, 2001, at S1.

² *Id.*

³ *Id.*

⁴ Geraldine Baum & Matea Gold, *Terrorism Hits the U.S.: A Day of Carnage and Chaos*, L.A. TIMES, Sept. 11, 2001, at S1.

⁵ Serge Schmemann, *U.S. Attacked: President Vows to Exact Punishment for “Evil”*, N.Y. TIMES, Sept. 12, 2001, at A1.

⁶ *Id.*

⁷ Cragg Hines, *Assault on America: Terrorists Strike from Air*, HOUSTON CHRONICLE, Sept. 11, 2001, at E1.

⁸ *Id.*

⁹ Michael Kranish, *Bush: U.S. to Hunt Down the Attackers*, BOSTON GLOBE, Sept. 11, 2001, at A6.

From October 1, any aircraft of more than 19 seats in any part of the world could be grounded unless the issue of drastically reduced cover for third-party war and terrorism damage is resolved.”¹⁰

“Lawmakers worldwide late last week were scrambling to pass emergency legislation to prevent all air travel from abruptly halting this week due to sweeping liability insurance problems that air carriers face following the Sept. 11 terrorist attacks in the United States.”¹¹

“The terrorism fallout has left airlines worldwide grappling with massive insurance increases. Without adequate insurance no airline can fly.”¹² “Insurance underwriters around the globe told airlines that war risk policies could be canceled as early as today [September 24, 2001].”¹³

“As of midnight Monday [September 24, 2001] in London, airline insurers in various countries canceled their existing war-risk policies and effectively switched carriers over to contracts that offer reduced coverage at a higher cost.”¹⁴ “Facing potential restrictions on what planes they could operate and which airports they could use because of the reduced coverage airlines over the weekend turned to their home governments for help.”¹⁵

“Airports across the country are struggling to protect themselves financially after having their insurance coverage for war and acts of terrorism canceled in the wake of the Sept. 11 attacks.”¹⁶ “Facing massive losses . . . insurance companies quickly stopped such disaster coverage for airlines, airports, and aviation service companies.”¹⁷ “Six days after the attacks, Los Angeles International Airport was notified that its coverage was being

¹⁰ Ben Sandilands, *Two U.S. Airlines Fear Collapse*, AUSTL. FIN. REV., Sept. 21, 2001, at 29.

¹¹ Dave Lenckus & Carolyn Aldred, *Policy Cancellations May Ground Aircraft*, 35: 39 BUS. INS., Sept. 24, 2001, at 1.

¹² Bruce Horovitz, *Airlines Get Help With High Insurance Costs For Now*, USA TODAY, Sept. 24, 2001, at B5.

¹³ *Id.*

¹⁴ Zach Coleman, *The Aftermath of Terror: Asian Airlines to Keep Normal Schedules*, ASIAN WALL ST. J., Sept. 25, 2001, at 11.

¹⁵ *Id.*

¹⁶ Jeffrey L. Rabin, *Airports “Fly Blind” With No Insurance Liability: LAX and Other Facilities Struggle to Find New Coverage For War and Acts Of Terrorism to Replace Policies Canceled After Attacks*, L.A. TIMES, Oct. 24, 2001, at A5.

¹⁷ *Id.*

discontinued in one week.”¹⁸ The world’s third busiest airport went without the coverage it previously had for up to \$750 million in damage from acts of war or terrorism.¹⁹

B. THE AFTERMATH OF SEPTEMBER 11: WHERE DO WE STAND?

Obviously, the most damage to privately insured property took place in New York City. As to the damage, any disputes regarding policy coverage would most likely be decided under New York law. Insurance commentators generally recognize that most terrorist attacks are covered under property and casualty insurance policies.²⁰ Generally, commercial property policy forms provided by the Insurance Services Office and used by most insurers do not carry terrorist exclusions, although they do provide exclusions for declared, undeclared, or civil war and for warlike actions by military forces.²¹ New York law is construed by two seminal war-risk cases, *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*²² and *Holiday Inns, Inc. v. Aetna Insurance Co.*²³ These cases, and other relevant authority, make it clear that the war-risk exclusions found in most all-risk policies will not exclude the events of September 11, 2001, in the absence of proof that those who destroyed the towers did so in an attempt to overthrow the U.S. government or were agents for a sovereign, foreign power.

Islamic militant Osama Bin Laden was not at the time the head of a governmental organization but rather seemed to be the leader of a terrorist group divided into a worldwide scattering of cells. Bin Laden and his Al Qaeda organization have been recognized by most countries as the perpetrators of the September 11 atrocities and remain the focus of a worldwide hunt. In 1996, Bin Laden sought refuge in Afghanistan. Currently, there is no evidence that Osama Bin Laden ever controlled the Taliban government or any other sovereign government at the time before, during or after the September 11 attacks. The Taliban denied any direct involvement in the September 11 attacks and even insisted that Bin Laden was not involved. That claim is yet to be proved or disproved. The ter-

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 8 Auto Insurance Report, *Fallout From NY and DC Attacks Reverberates Far, Wide and Long* 1 (Sept. 17, 2001), available at <http://www.riskinformation.com>.

²¹ *Id.*

²² *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (1974).

²³ *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983).

rorist activities of Bin Laden's organization had been aimed at punishing America for its support of Israel and moderate Arab states. At present, the proof necessary to sustain a denial of these claims under most war-risk exclusions does not appear to be present. Certainly all the evidence is not yet in. Any carrier denying coverage pursuant to the war-risk exclusions discussed below would bear the burden of proving the attacks were designed to overthrow the U.S. government or were committed by agents of a sovereign, foreign power. The precise wording of each policy is, therefore, critical to any determination of coverage. Many aviation hull policies in particular contain terrorism exclusions that, based on current reports, would appear to exclude coverage for these losses.

C. THE FINANCIAL EFFECTS OF SEPTEMBER 11 ON AIRLINES

United Airlines had \$1.5 billion of liability insurance per aircraft per occurrence, and American Airlines had at least \$1.5 billion of liability insurance. The insurers that participated in the 2000 aviation underwriting pool for U.S. Aircraft Insurance Group led United's liability and hull coverage. London-based Global Aerospace Underwriting Managers Ltd. was American Airlines' lead insurer. If insurers were to treat each hijacking as a separate occurrence, the commercial aviation insurance market would have faced up to \$6 billion in losses, which exceeded the market's premium volume from commercial airlines for the previous four calendar years combined. Liability losses stemming from the crashes at the Pentagon and in the Pennsylvania countryside, though, would likely be far less than the airlines' liability limits. The insured value of the hijacked planes totaled \$128.8 million, ranging from \$21 million to \$45 million each. The hull war risk market paid those losses just days after the terrorist attacks.

In mid-September, six days after the attack, insurers began giving notice to airlines that their war and allied perils buyback coverage would be cancelled within a week.²⁴ Insurers, though, would allow airlines to purchase \$50 million of the coverage for \$1.25 per passenger per enplanement (each time a passenger was ticketed).²⁵ Fifty million dollars of coverage was only a sub-limit of a typical commercial airlines' liability coverage.²⁶ Based

²⁴ See Global Letter, *supra* text accompanying note 21.

²⁵ Lenckus & Aldred, *supra* note 11.

²⁶ See *id.*

on a 20% reduction of 2000 enplanement figures, the buyback charge would then cost United Airlines more than \$83.8 million annually, American Airlines more than \$86.2 million annually, and Delta Air Lines Inc. nearly \$105.6 million annually.²⁷ Despite the airline industry's financial nightmares, they still found themselves obligated to purchase war and allied perils coverage to comply with the terms of their airplane leasing agreements, bond issues and unsecured loans from financial institutions.²⁸ Without the coverage, airlines would have to ground their planes. But before the September 11 attacks, airlines had their full liability policy limits to cover third-party losses on the ground resulting from hijackings or other terrorist acts involving airlines.²⁹ Those limits more than satisfied the \$500 million hijacking and terrorist coverage requirements that leasing companies and banks imposed on airlines.³⁰ As a result of the new \$50 million sublimit that insurers imposed, the already cash-strapped airlines found themselves \$450 million short of meeting their leaseholder, bond and bank requirements.³¹ Under Congressional legislation, the United States federal government agreed to cover terrorist-related liabilities exceeding \$100 million that any air carrier incurred within 180 days of enactment of the bill.³² Coupled with the \$50 million of war and allied perils coverage available from aviation insurers, the legislation seemed to leave each airline on the hook for \$50 million of terrorist-related liabilities.³³

In the United Kingdom, the government covered the war and allied perils risks excess of \$50 million³⁴ for airlines, airports, and security firms. The government planned to charge for the coverage but would waive the charge for the first 30 days "in recognition of the particular circumstances which the airlines face at present."³⁵ Similar discussions began taking place worldwide, as governments grappled with the insurance crisis faced by airlines.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See *infra* Part IV.C.

³³ Lenckus & Aldred, *supra* note 11.

³⁴ See *id.*

³⁵ See *id.*

This Comment looks at the potential application of “war exclusions” and the significance of terms such as “war,” “hijacking,” “terrorist,” “insurrection,” and “civil war.” The interpretation of these terms may cause insurers and reinsurers all over the world to re-evaluate their war exclusions. This Comment examines the effect of the September 11, 2001 incidents on aviation insurance for air carriers and aviation insurance providers.

II. DEVELOPMENT OF AVIATION INSURANCE

Aviation insurance surfaced a little over ninety years ago when Lloyd’s of London developed the first policy in 1911.³⁶ The policy covered only legal liability.³⁷ Aviation insurance did not truly develop in the United States until 1919 when Travelers Insurance Company announced a comprehensive insurance program for air risks.³⁸

Several factors contributed to the stability of commercial aviation and the establishment of the United States aviation insurance market: first, the Air Mail Act of 1925 allowed private carriers to transport mail;³⁹ second, the Air Commerce Act of 1926 called for safety rules and regulations and the licensing of pilots;⁴⁰ and finally, Charles Lindbergh’s historic transatlantic flight stimulated a massive build up of the aviation industry and furthered an interest in aviation insurance.⁴¹

Consequently, competition led to the creation of groups focused on serving aviation insurance’s needs.⁴² Fire insurance companies and casualty insurance companies pooled themselves to spread aviation risks.⁴³ There were three early groups between 1927 and 1929: the United States Aircraft Insurance Group (USAIG) managed by the United States Aviation Underwriters, Inc. (USAU), the Associated Aviation Underwriters (AAU), and the Aero Insurance Underwriters (AIU).⁴⁴ The

³⁶ ALEXANDER T. WELLS & BRUCE D. CHADBOURNE, INTRODUCTION TO AVIATION INSURANCE AND RISK MANAGEMENT 4 (1992).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 6-7.

group approach is still the preferred method of operation in the United States.⁴⁵

A period of growth and confusion developed during the years immediately following World War II, and industry overexpansion led to the failure of the AIU in 1947. Around this time independent underwriters decided to begin providing direct aviation insurance. In 1946 the Insurance Company of North America (INA) started a program to serve owners of private planes, aircraft dealers, corporate operators and fixed-base operators.⁴⁶

The 1960s were a period of booming growth in all segments of the aviation industry.⁴⁷ This growth led to significant expansion and competition in the insurance and reinsurance markets.⁴⁸ Although this period of profitability persisted through the 1970s, the 1980s brought an abrupt halt.⁴⁹ The 1980s were a period of intense media focus on general aviation accidents, accompanied by an increasingly litigious society.⁵⁰ The years since have been a period of fluctuation affected by safety records, currency fluctuations and the expansion of foreign insurance underwriters.⁵¹

III. THE AVIATION INSURANCE POLICY

Modern aviation insurance is generally classified as hull insurance or liability insurance.⁵² Aviation insurance policies generally cover the following: (1) aviation hull insurance, (2) aviation liability insurance, (3) airport owners and operator insurance, and (4) aviation manufacturers' insurance.⁵³ Although separate policies may be issued, the most common aviation policies combine both hull and third-party liability coverage.⁵⁴

The basic content and structure of the typical aviation insurance policy includes: (1) insuring agreements; (2) definitions; (3) exclusions; (4) conditions; and (5) declarations.⁵⁵ Specific

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 10.

⁴⁷ *See id.* at 12-15.

⁴⁸ *See id.*

⁴⁹ *See id.* at 17.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 2 BUSINESS INSURANCE LAW AND PRACTICE GUIDE § 19.04 [1] (Matthew Bender ed., 2001) [hereinafter BUSINESS INSURANCE].

⁵³ *See id.* § 19.03 [1].

⁵⁴ *Id.* § 19.04 [1].

⁵⁵ *Id.* § 19.03 [1].

provisions will be included for the particular risks being insured.⁵⁶ The “insuring agreements section describes the risk being undertaken for each type of risk covered, identifies the insured, and establishes the insurer’s duty to defend or indemnify the insured.”⁵⁷ The definitions section will define terms appearing in the policy.⁵⁸ The exclusions section limits coverage under the policy for loss caused by certain events.⁵⁹ The insurer’s duty to defend or indemnify may be suspended for any loss resulting from these excluded events.⁶⁰ Insurers have the burden of proof when relying solely on exclusions.⁶¹ If the exclusion is unclear or ambiguous it will be construed strictly against the insurer.⁶² Some major aircraft hull coverage exclusions include wear and tear, tires, embezzlement, war confiscation, and depreciation or loss of use.⁶³ The conditions section relates to the required duties of parties in case of a loss, accident or claim.⁶⁴ A condition is usually a condition precedent to the liability of the insurer.⁶⁵ An insurer can reject a policy if the insured (1) fails to meet the terms of a condition precedent and (2) the insured failed to prove the use of reasonable care and diligence in attempting to comply.⁶⁶ The declarations section provides identifying information, summarizes relevant facts, reviews the scope of the coverage and recites the limits of liability.⁶⁷

Aircraft hull represents actual physical damage to the aircraft itself.⁶⁸ Aircraft hull insurance protects aircraft owners, operators, and other parties with a direct financial interest (such as lienholders) from replacement costs, repairs, accidental loss of, or damage to the aircraft.⁶⁹ Hull insurance can be written either as an “all-risk” policy or as a “named perils” policy.⁷⁰ A

⁵⁶ *Id.*

⁵⁷ *Id.* § 19.03 [2].

⁵⁸ *Id.* § 19.03 [3].

⁵⁹ *Id.* § 19.03 [4][a].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ WELLS & CHADBOURNE, *supra* note 36, at 104-05.

⁶⁴ BUSINESS INSURANCE § 19.04 [5].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* § 19.04 [6].

⁶⁸ WELLS & CHADBOURNE, *supra* note 36, at 102.

⁶⁹ ROD D. MARGO, AVIATION INSURANCE 145 (1989); BUSINESS INSURANCE § 19.04 [2].

⁷⁰ BUSINESS INSURANCE § 19.04 [2].

named perils policy will list and define covered perils such as: fire, lightning, hail, smoke, vandalism, snow, or ice.⁷¹ An all-risk policy will cover all perils unless they are otherwise excluded.⁷² All-risk policies provide broader coverage, and although they cost more, are much more common.⁷³ A critical difference between the policies is the insurer's burden of proof in denying coverage.⁷⁴ In an all-risk policy the insurer must show that coverage does not apply to a specific loss; therefore, it is more difficult for an insurer to deny coverage.⁷⁵ Under a named perils policy, an insurer only has to show that a specific peril listed within the policy caused a loss.⁷⁶ By writing exclusions into the all-risk policy, the insured party is automatically indemnified for losses without having to be involved in a battle between the all-risk policy and the war risk policy.⁷⁷ If an insured party has both an all-risk policy and a war risk policy, the all risk insurer has the burden of showing the loss is excluded from coverage before the insured can claim coverage for the loss from the war risk carrier.⁷⁸

All-risk insurance comprises three general categories: (1) "all-risk—ground and flight," (2) "all-risk—not in motion," and (3) "all-risk—not in flight."⁷⁹ All-risk—ground and flight provides the broadest coverage by extending protection to aircrafts while they are on the ground or in the air when loss occurs.⁸⁰ All-risk—not in motion provides coverage for physical loss or damage to an aircraft while it is on the ground and not moving under its own power or momentum.⁸¹ All-risk—not in flight covers the aircraft while it is stationary or while taxiing.⁸²

⁷¹ WELLS & CHADBOURNE, *supra* note 36, at 222.

⁷² *Id.*

⁷³ *Id.*; BUSINESS INSURANCE § 19.04 [2][a].

⁷⁴ WELLS & CHADBOURNE, *supra* note 36, at 222.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Rod D. Margo, *Aspects of Insurance in Aviation Finance*, 62 J. AIR L. & COM. 423, 447-48 (1996) [hereinafter *Aviation Finance*].

⁷⁸ *Id.*

⁷⁹ BUSINESS INSURANCE § 19.04 [2][a].

⁸⁰ WELLS & CHADBOURNE, *supra* note 36, at 102.

⁸¹ *Id.*

⁸² *Id.* See generally *Compass Ins. Co. v. Vanguard Ins. Co.*, 649 F.2d 331, 333 (5th Cir. 1981) (defining "in flight" as "the period from the time the aircraft moves forward in taking off. . . for air transit, while in the air, and until the aircraft completes its landing and landing run after contact with the land or water"; defining "taxiing" as the period when an aircraft is in motion, but not in flight).

Aviation liability insurance or “third-party” insurance is issued primarily for the benefit of passengers and individuals or property on the ground.⁸³ It “provides the policyholder with protection against third party claims involving bodily injury or property damage because of ownership, maintenance, or use of aircraft.”⁸⁴ A typical aviation liability policy will cover: (1) bodily injury, excluding passenger liability; (2) passenger liability; (3) property damage liability; and (4) medical payments.⁸⁵

Airport owners and operators policies cover injury or damage to third parties occurring on airport property or due to airport operations.⁸⁶ Coverage includes: (1) airport premises—operations; (2) hangar keepers’ liability; and (3) product liability.⁸⁷

IV. WAR, HIJACKING AND TERRORISM INSURANCE

A. EMERGENCE OF WAR RISK INSURANCE

The United States and London insurance markets suffered heavy losses during the Spanish Civil War.⁸⁸ As a result, in 1936-37 the insurance industry entered into the “War and Civil War Risks Agreement.”⁸⁹ In the United States the agreement generally meant, “exclusive of the United States and Canada, no underwriter will insure against damages due to war, including civil war.”⁹⁰ In London, the insurance market (including Lloyd’s) excluded coverage for “war on land risks” except for on landed cargo.⁹¹ Presently, United States aviation all-risk insurers still exclude loss from “war and civil risks” by prescribing to the Common North American Airline War Exclusion Clause (CWEC).⁹²

⁸³ BUSINESS INSURANCE § 19.04 [3][a].

⁸⁴ WELLS & CHADBOURNE, *supra* note 36, at 108.

⁸⁵ BUSINESS INSURANCE § 19.04 [3][a].

⁸⁶ *Id.* § 19.04 [4][a].

⁸⁷ *Id.*

⁸⁸ Kathleen E. Shannon, *Rulings on War-Risk Exclusion: A Major Concern of Insurers*, N.Y.L.J., Aug. 24, 1984, at A1; Jennifer Thompson & Simon Sloane, *War and Terrorism-Exclusions, Extensions and Issues of Aggregation in the Non-Marine Markets*, Holman Fenwick & Willan, at <http://www.hfw.com/13/new/fnew13b.html> (last visited July 1, 2003).

⁸⁹ *Id.*

⁹⁰ Shannon, *supra* note 88, at A1.

⁹¹ Thompson & Sloane, *supra* note 88.

⁹² The CWEC excludes any losses arising from:

(a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or by any independent unit or individual engaged in ac-

The War, Hijacking and Other Perils Exclusion Clause (AVN 48B) used by the London market is different in that it does not attempt to exclude hijackings by persons not aboard the aircraft.⁹³ The London market introduced this clause after the 1968 Israeli raid on Beirut airport and it is now found in every aviation hull and liability policy.⁹⁴ Both AVN 48B and the CWEC are found in policies issued in the United States.⁹⁵ Some

tivities in furtherance of a program of irregular warfare. Any or all of the above applying howsoever and wheresoever occurring. (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter. (c) Other than excluded in paragraph (a) hereinabove, any unlawful seizure, diversion or exercise of control of the aircraft, or attempt thereof, by force or threat thereof or by any other form of intimidation, by any person or persons whether on board aircraft or otherwise. (d) Other than as excluded in paragraph (a) hereinabove, strikes, lockouts, disturbances, riots, civil commotion. (e) Other than as excluded in paragraph (a) hereinabove, vandalism, sabotage, malicious act or other act intended to cause loss or damage.

MARGO, *supra* note 69, at 253-54 & n.239.

⁹³ It states:

This Policy does not cover claims caused by (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power. (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter. (c) Strikes, riots, civil commotions or labour disturbances. (d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional. (e) Any malicious act or act of sabotage. (f) Confiscation, nationalisation seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de factor) or public or local authority. (g) Hijacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured. Furthermore this Policy does not cover claims arising whilst the Aircraft is outside control of the Insured by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Insured on the safe return of aircraft to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

MARGO, *supra* note 69, app. at 417.

⁹⁴ *Id.* at 223.

⁹⁵ *Aviation Finance*, *supra* note 77, at 445-46.

of the risks excluded in both the CWEC and AVN 48B clauses can be “written back” into hull or liability all-risks policies.⁹⁶ These risks available for “write back” are available at an extra premium and are specified in Extended Coverage Endorsements.⁹⁷ Risks that can be written back into aircraft hull policies include strikes, riots, civil commotions, acts of sabotage, and hijacking.⁹⁸ Liability all-risk policies allow for all risks to be written back except for the hostile explosion of a nuclear weapon.⁹⁹ In the case of aircraft hull policies, some might desire full coverage for war risks or other risks not included in the Extended Coverage Endorsements. It is then necessary to purchase an aviation war and civil risks policy. United States insurers do not provide full war risk insurance; therefore, such coverage must be purchased from the London specialist war insurance market and not from the aviation market.¹⁰⁰

B. WAR RISK EXCLUSIONS AND THE COURTS

While President Bush condemned the atrocities as “acts of war,” insurers must go further in analyzing the coverage afforded by their policies. Such analysis must recognize fundamental principles for the construction of all-risk policies of property insurance. All-risk policies do not cover all losses. However, once the insured demonstrates the existence of the policy and fortuitous physical damage to covered property, the burden falls on the insurer to prove that the physical damage resulted from one or more of the excluded causes of loss. Prior cases interpreting similar war-risk exclusions illustrate the point.

One dictionary defines “war” as: “Hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state.”¹⁰¹ Case law precedent does not support the application of the “war” exclusion to the terrorist acts of September 11. United States courts have consistently followed British courts, generally

⁹⁶ *Id.* at 446.

⁹⁷ *Id.*

⁹⁸ *Id.*; see also MARGO, *supra* note 69, app. at 419 (showing Form AVN 51—Extended Coverage Endorsement (Aircraft Hulls)).

⁹⁹ *Aviation Finance*, *supra* note 77, at 446-47; see also MARGO, *supra* note 69, app. at 419 (showing Form AVN 52C—Extended Coverage Endorsement (Aircraft Liabilities)).

¹⁰⁰ *E.g.*, *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 994; MARGO, *supra* note 69, app. at 225.

¹⁰¹ BLACK'S LAW DICTIONARY 1576 (7th ed. 1999).

allowing a war exclusion clause to apply only when damage is caused by the genuine warlike acts of sovereign governments engaged in hostile activities.

The courts will apply fundamental principles for the construction of all-risk policies when analyzing claims by an insured that a policy with a war exclusion clause covers a loss.¹⁰² Exclusions will be narrowly construed so as to maximize coverage.¹⁰³ The insurer has the burden of proving application of the exclusion.¹⁰⁴ Similarly, the insured must prove that the loss is within the terms of the policy.¹⁰⁵ Generally, the loss will be covered by the policy, and the insurer will have to prove that the loss is negated by the war exclusion.¹⁰⁶ Contrarily, when a war risk policy is involved, the policy will be broadly construed to "achieve coverage," therefore the insured will have to prove that the policy covers the loss.¹⁰⁷

The leading case on war risk exclusions and aviation hull insurance is *Pan American World Airways, Incorporated v. Aetna Casualty & Surety Company*,¹⁰⁸ where terrorists hijacked and later destroyed a Pan Am airplane and the airline claimed the lost property was covered under its insurance. In *Pan American*, the Second Circuit Court of Appeals held that where members of a Palestinian terrorist group from Jordan hijacked an aircraft over London and destroyed the aircraft on the ground while in Egypt, the ensuing loss of the aircraft was not due to war within the meaning of the term as used in the exclusionary clauses of the all risk policies covering the aircraft.¹⁰⁹ Two members of the PFLP forced the Brussels-New York flight (Pan Am 83) to divert to Beirut, where it refueled and the hijackers brought aboard a demolitions expert and explosives.¹¹⁰ The hijackers, members of the Popular Front for the Liberation of Palestine (PFLP) flew the Boeing 747 to Cairo.¹¹¹ After evacuating the passengers and crew, the plane was destroyed.¹¹² Two hours before the hijacking of Pan Am 83, PFLP members hijacked two other trans-

¹⁰² Andrew J. Nocas, 20 SUM BRIEF 10, 14 (1991).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 505 F.2d 989 (2d Cir. 1974).

¹⁰⁹ *Id.* at 1022.

¹¹⁰ *Id.* at 993.

¹¹¹ *Id.*

¹¹² *Id.*

Atlantic flights, TWA 741 out of Frankfurt and Swissair 100 out of Zurich.¹¹³ A simultaneous attempt to hijack El Al Flight 219 was foiled in the air by airline security personnel.¹¹⁴ Three days later the PFLP hijacked a BOAC VC-10 and added it to the collection. All the planes were taken to Dawson's Field in Jordan where they were blown up.¹¹⁵ In *Pan American*, the main question on appeal was whether the loss of the aircraft would be borne by the three all-risk carriers or the war-risk carriers.¹¹⁶ Pan American Airlines had three types of insurance providing coverage: (1) all-risk insurance, (2) private sector war risk insurance, and (3) a war risk insurance policy provided by the United States Secretary of Transportation.¹¹⁷ Because United States insurers do not provide private war risk insurance, Pan American purchased a policy from the London market and then turned to the United States government for coverage above the London limit.¹¹⁸ The all-risk insurance was provided by the only three underwriters in the world who wrote aviation hull insurance for United States air carriers: the United States Aviation Insurance Group (USAIG), members of the Lloyd's underwriting syndicate (Lloyd's) and the Associated Aviation Underwriters (AAU).¹¹⁹ The three all-risk carriers asserted a war risk exclusion.¹²⁰

¹¹³ *Id.* at 999.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 993.

¹¹⁷ *See id.* at 994-96.

¹¹⁸ *Id.* at 995.

¹¹⁹ *Id.* at 993-94.

¹²⁰ The exclusions in the all-risk policies read:

C. This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from: 1. capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful (this subdivision 1 shall not apply, however, to any such action by a foreign governmental authority following the forceful diversion to a foreign country by any person not in lawful possession or custody of such insured aircraft and who is no an agent or representative, secret or otherwise, of any foreign government or governmental authority); 2. war, invasion, civil war, revolution, rebellion, insurrection or war-like operations, whether there be a declaration of war or not; 3. strikes, riots, civil commotion.

Id. at 994.

The twenty-four day trial involved forty-one witnesses and over four hundred exhibits.¹²¹ The all-risk carriers introduced evidence of the history of war and political tension in the Middle East and Jordan.¹²² They attempted to show that the Palestine Liberation Organization (PLO), PFLP and other Palestinian organizations were "operated as paramilitary quasi-governments" in order to prove that the actions of the PFLP in commandeering and destroying the Pan Am jet fell within the exclusions quoted above.¹²³ The PFLP was described as an extreme militant offshoot of the PLO with about 600 to 1,200 total members and a committed core of 150 receiving funding and weapons from China and North Korea.¹²⁴ Although the destruction of Israel was its primary goal, the PFLP also condemned "reactionary" Arab regimes, capitalism, and the United States.¹²⁵ The hijackers explained in their own words that they hijacked the plane because of America's support of Israel.¹²⁶

The court agreed the loss would be covered if Pan American or the war risk insurers could reasonably interpret the terms of exclusion to allow coverage.¹²⁷ The all-risk insurers had the burden of showing more than just a reasonable interpretation under which the loss would be excluded; they had to show that an interpretation favoring them was the only reasonable reading of at least one of the terms of exclusion.¹²⁸ The court then invoked the rule of *contra preferentem* as the rule of construction "when an insurer fails to use apt words to exclude a known risk,"¹²⁹ therefore "if the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire."¹³⁰ The circuit court was influenced by the all-risk insurers' knowledge that the exclusions were ambiguous as to the context of a political hijacking. Furthermore, the all-risk insurers were aware of, and failed to use, more specific

¹²¹ *Id.* at 996.

¹²² *Id.* at 998.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 999-1000.

¹²⁸ *Id.* at 1000 (citing *Sincoff v. Liberty Mut. Fire Ins. Co.*, 183 N.E.2d 899, 901 (N.Y. 1962)).

¹²⁹ *Id.* (citing *Nat'l Screen Serv. Corp. v. United States Fid. & Guar. Co.*, 364 F.2d 275, 278-79 (2d Cir. 1966)).

¹³⁰ *Id.* at 1007.

exclusionary terms, which other insurers use.¹³¹ The Second Circuit Court of Appeals explained that the use of one of those clauses would have prevented the ensuing loss.¹³²

The court followed a narrow construction of the policy in its causation analysis.¹³³ It adopted a mechanical test of proximate causation for dealing with insurance cases. This test would look only at the “causes nearest to the loss” and, in keeping with the doctrine of *contra proferentem*, specific language must be drafted if the insurance carrier wanted more remote causes to affect the scope of exclusion.¹³⁴

The court found that the term “war” generally applied to the “employment of force between governments or entities essentially like governments, at least *de facto*.”¹³⁵ The court, citing American and British caselaw and commentators stated, cases have “established that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. . . . War is ‘that state in which a nation prosecutes its right by force.’”¹³⁶ The court agreed that insurance caselaw defined war as “hostilities carried on by entities that constitute governments at least *de facto* in character.”¹³⁷ The PFLP never claimed to be a state and it could not act on behalf of any of the states in which it existed when it hijacked the airplane, particularly since those states consistently opposed hijacking.¹³⁸ The hijackers were “agents of a radical political group, rather than a sovereign government.”¹³⁹ The court concluded that, even if the PFLP was

¹³¹ Compare *supra* text accompanying note 104, with *Pan Am.*, 505 F.2d at 1001 (quoting the exclusion clause available in the London market under Form AV-48A: “This Policy does not cover claims directly or indirectly occasioned by, happening through or in consequences of: (d) Any act of one or more persons, whether not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional. (e) Any malicious act or act of sabotage. (g) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight. . . .”).

¹³² *Pan Am.*, 505 F.2d at 1001.

¹³³ The court explained that: “Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words ‘due to or resulting from’ limit the inquiry to the facts immediately surrounding the loss.” *Id.* at 1006 (citing *Standard Oil Co. v. United States*, 340 U.S. 54, 58 (1950)).

¹³⁴ *Id.* at 1007.

¹³⁵ *Id.* at 1012.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1013.

¹³⁹ *Id.* at 1015.

waging a "guerilla war," a guerrilla group must have at least some incidence of sovereignty before its activities can properly be defined as war.¹⁴⁰ The act of the terrorists in hijacking the airplane was, therefore, not an act of "war" or "warlike policies" for purposes of the insurance exclusions. The court also rejected the insurers' claim of exclusion under the much broader term of "warlike operations."¹⁴¹

The circuit court then rejected the insurers' argument that the hijacking was an act of "insurrection" within the meaning of the policy terms.¹⁴² It defined "insurrection" as "(1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the constituted government and seizing its powers."¹⁴³ The court held there was no causal element of intent between the terrorist hijacking and an attempt at overthrowing the Jordanian government.¹⁴⁴ The act was intended as a "symbolic blow" in the political group's battle against the United States.¹⁴⁵ Furthermore, even if there had been an insurrection in Jordan, the hijacking resulted over a "domestically stable area" that at the moment was not engaged in war with Jordan.¹⁴⁶ The court finally held that the loss from the terrorist hijacking did not fall within any of the exclusions and was therefore covered under the all-risk policies.¹⁴⁷ Under the *Pan American* analysis, any insurance carriers bold enough to file a September 11th war exclusion claim will find it very difficult to prevail. First, the insurer will have to contend with the narrow mechanical test of causation. The courts will look at the specific acts of crashing airplanes into buildings without giving credit to any outside motivations and will then inquire if such an act is an act of war. Furthermore, a sovereign or quasi-sovereign power

¹⁴⁰ *Id.* at 1013.

¹⁴¹ "There is no warrant in the general understanding of English, in history, or in precedent for reading the phrase 'warlike operations' to encompass (1) the infliction of intentional violence by political groups (neither employed by nor representing governments) (2) upon civilian citizens of non-belligerent powers and their property (3) at places far removed from the locale or the subject of any warfare. (4) This conclusion is merely reinforced when the evident and avowed purpose of the destructive action is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects." *Id.* at 1015-16.

¹⁴² *Id.* at 1019.

¹⁴³ *Id.* at 1017.

¹⁴⁴ *Id.* at 1019.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 1021.

and not just a terrorist organization represented by scattered cells must have committed such an act.

Another case that can provide significant guidance is *Holiday Inns, Inc. v. Aetna Insurance Co.*,¹⁴⁸ in which the U.S. District Court in New York interpreted the broad exclusionary language prefacing the war risk exclusion. The court quoted *Pan American* extensively and approvingly, declining to apply the war risks exclusion to a claim for damages to the Beirut Holiday Inn in Lebanon.¹⁴⁹ The Holiday Inn, Beirut (a city once viewed as the "Paris of the Middle East") opened for business in 1974 in one of the city's more expensive commercial districts.¹⁵⁰ What ensued is every tourist's worst nightmare. In 1975 the hotel became the center of a fierce battle between factional groups fighting for possession and control of the district.¹⁵¹ Between October 1975 and April 1976 the hotel sustained continuous damage from shelling and rockets.¹⁵² The insurer, Aetna, claimed the conflict in Lebanon fell under three excluded perils: war, civil war, and insurrection.¹⁵³

In examining the claim of "insurrection," the court adopted the definition provided by *Pan American*.¹⁵⁴ The court looked for evidence of any damage caused to the hotel by an identifiable group or movement intent on overthrowing the existing government and assuming power for itself.¹⁵⁵ Although there was continuous strife amongst the different factions in Lebanon, none of them could be regarded as having the "maximum objec-

¹⁴⁸ *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983) (providing an excellent historical, social, and political background to the tragic violence in Lebanon).

¹⁴⁹ *See id.* at 1461.

¹⁵⁰ *Id.* at 1467-68.

¹⁵¹ *Id.*

¹⁵² *See id.* at 1467-72.

¹⁵³ The exclusion provided:

2. This insurance does not cover: a) Loss or damage caused by any of the perils hereby insured against, if such loss or damage either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or either in origin or extent, directly or indirectly, proximately or remotely, arises out of or in Connection with any such occurrences, namely: "War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) civil war, mutiny, insurrection, revolution, conspiracy, military or usurped power."

Id. at 1463.

¹⁵⁴ *Id.* at 1487 (citing *Pan Am.*, 505 F.2d at 1017).

¹⁵⁵ *Id.* at 1487-88.

tive" of overthrowing the Lebanese government.¹⁵⁶ Rather, the various groups were striving to maintain a status quo that better preserved their interests.¹⁵⁷ Aetna was unable to sustain its burden of proving the "crucial element of intent to overthrow and replace the government of Lebanon," and the court, therefore, refused to uphold the insurrection exclusion.¹⁵⁸ The court then disposed of the "civil war" claim by once again turning to *Pan American*.¹⁵⁹ Aetna's failure to prove the existence of insurrection was fatal to its civil war defense. Citing *Pan American*, the court agreed that civil war was a "progressive stage" that must first be preceeded by insurrection. Insurrection is the intent to overthrow an existing government and seize its power, and without that rudimentary intent there cannot be civil war.¹⁶⁰

As to the "war" claim, Aetna argued that the fighting in Lebanon involved "three clearly-defined independent entities, each having the attributes of sovereignty or, at the least, quasi-sovereignty," and therefore the war exclusion could be applied to deny coverage.¹⁶¹ In evaluating Aetna's claim of quasi-sovereignty, the court focused only on the one faction occupying the Holiday Inn and doing the damage at the time of the fighting.¹⁶² The court concluded that this faction did "not rise to the level the status of a sovereign state," and concluded that it was not a sovereign entity.¹⁶³ Alternatively, the court stated that even if the group was recognized as a quasi-sovereign entity, it was not at war with another sovereign governmental entity that contributed to the damage, therefore, the insurer could not invoke the war exclusion clause.¹⁶⁴ If applied to the September 11 attacks, *Holiday Inn* seems to suggest that insurance carriers will not be able to rely on claims of insurrection, civil war, or war.

On the other hand, one court ruled that the war exclusion applied to property stolen during a period of hostilities between the United States and Panama in *TRT/FTC Communications, Inc. v. Insurance Company of the State of Pennsylvania*.¹⁶⁵ Civil disorder erupted in the central business district of Panama City, where

¹⁵⁶ *Id.* at 1488-89.

¹⁵⁷ *Id.* at 1488.

¹⁵⁸ *Id.* at 1493.

¹⁵⁹ *See id.* at 1493-94.

¹⁶⁰ *See id.* at 1494-95.

¹⁶¹ *Id.* at 1501.

¹⁶² *Id.*

¹⁶³ *See id.* at 1502.

¹⁶⁴ *Id.* at 1503.

¹⁶⁵ *TRT/FTC Comms., Inc. v. Ins. Co. of Pa.*, 847 F. Supp. 28 (Del. 1993).

TRT operated a sales facility.¹⁶⁶ Armed men in civilian clothing, carrying military assault rifles, broke into the facility and stole merchandise and equipment.¹⁶⁷ At the time of the theft, Panama had declared war on the United States and was in a war preparedness status, the court determined that the men who robbed TRT were part of some arm of the Panamanian government's forces involved in the war effort.¹⁶⁸ However, the court stated, "regardless of whether the men were part of the Panamanian forces or a band of looters, there is ample evidence to support the conclusion that their actions against TRT were enabled by the military hostilities occurring between Panama and the United States."¹⁶⁹ Although those perpetrating the theft may not have been part of the military or government of Panama, the loss that they caused would not have occurred absent Panama's declaration of war and the U.S. invasion of Panama.¹⁷⁰ This court supported the idea that even though a non-sovereign caused the loss in question, the act was triggered by the existence of military hostilities between Panama and the United States. In any event, an insurer relying on this holding would have to prove that loss claimed was a result of existing hostilities between the United States and another sovereign government, even if the party causing the loss were a non-sovereign.

Another conclusion that has arisen from past interpretations of the war exclusion is that, to be excluded by that clause, a claim must involve a hazard distinct from that of peacetime. In other words, neither aggravation of a hazard existing in peacetime nor removal of a peacetime safeguard constitutes a war risk or a warlike operation. The following cases discuss this point and emphasize that courts will relegate the war exclusion to a nonperforming role if it can be shown that damage to covered property can otherwise be attributed to some other specified cause of loss.

In *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.*, the United States Supreme Court held that damage from collision of two merchant ships sailing the Atlantic Ocean in separate convoys during World War I, with no hostile warships apparently present, was not a war risk, although the convoys were traveling at night without lights and one convoy had changed its course

¹⁶⁶ *Id.* at 29.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 30.

¹⁷⁰ *Id.*

because of a submarine attack in the North Atlantic a few hours earlier.¹⁷¹ Applying a very narrow causation rule, the Supreme Court concluded that the damage was the result of a collision, and it could have resulted at any time, during war or peace.¹⁷² This case is old but still valid since courts in the United States have not departed from the fundamental principle laid down in the decision.¹⁷³ And, on its authority, most insurance professionals assumed, even during World War II, that such things as the aircraft damage section of the extended coverage endorsement would cover damage from the crash of a military or naval aircraft during training maneuvers, and that damage from an otherwise insured peril would not be excluded merely because it occurred during a blackout.¹⁷⁴

In *Airlift International, Inc. v. United States*, the federal court was presented with a claim when an insured aircraft was lost over Vietnam during wartime after it collided with a military aircraft.¹⁷⁵ The insurer denied coverage based on the war exclusion, but the court held that the loss was due to an aviation peril, although the two aircraft were flying over Vietnam only because there was a war raging.¹⁷⁶ The court decided that the collision was not a hazard existing only in wartime and, therefore, the exclusion was not applicable in this case.¹⁷⁷

In *American Fire and Casualty Co. v. Sunny South Aircraft Service, Inc.*, a Florida court heard arguments that the war exclusion should apply against a claim for loss to an aircraft that was hijacked en route to Cuba and was then damaged by a Cuban military plane.¹⁷⁸ The court found that the loss was proximately caused by theft rather than warlike activity, so the war exclusion did not preclude coverage.¹⁷⁹ Theft was not considered a hazard distinct from that of peacetime, so even though the insured plane was damaged by a warplane, the war exclusion would not apply to this type of loss.¹⁸⁰

¹⁷¹ *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924).

¹⁷² *Id.* at 488.

¹⁷³ *Pan Am.*, 505 F.2d at 992.

¹⁷⁴ *Id.*

¹⁷⁵ *Airlift Int'l, Inc. v. United States*, 460 F.2d 1065 (5th Cir. 1972).

¹⁷⁶ *Id.* at 1066.

¹⁷⁷ *Id.*

¹⁷⁸ *Am. Fire & Cas. Co. v. Sunny S. Aircraft Serv., Inc.*, 151 So.2d 276 (Fla. 1973).

¹⁷⁹ *Id.* at 278.

¹⁸⁰ *Id.*

Finally, a number of cases arising early in World War II established the conclusion that war need not be officially declared in order for an insurer to invoke the war exclusion. Cases involving life and accident insurance (but with war exclusions worded similarly to that found on a standard property insurance form) held that the 1941 attack on Pearl Harbor was war within the meaning of the exclusion clauses even though there had been no formal declaration of war at the time of the attack. Typical of these cases is *New York Life Insurance Company v. Bennion*.¹⁸¹ In contrast, another life insurance case, *Stinson v. New York Life Insurance Company*, held the war to be over, as far as an insurance exclusion was concerned, after the cessation of actual fighting in 1945, even though there had been no official and formal declaration of peace.¹⁸²

War exclusions on property forms today specifically refer to undeclared war,¹⁸³ so any hostilities carried out by a sovereign state against another sovereign state will be considered subject to the war exclusion regardless of whether or not war has been officially declared. Courts have enforced war, civil war, and insurrection exclusions, but in each case, the property in question was damaged during a war or armed invasion, or by defined groups acting with the express purpose of ousting the existing government.¹⁸⁴

Carriers that assert war-risk exclusions will be forced to prove such exclusions apply to sustain any claim denials. Current evidence does not appear to support application of those exclu-

¹⁸¹ *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946).

¹⁸² *Stinson v. New York Life Ins. Co.*, 167 F.2d 233 (D.C. Cir. 1948).

¹⁸³ See MARGO, *supra* text accompanying note 77.

¹⁸⁴ See *Home Ins. Co. v. Davila*, 212 F.2d 731 (1st Cir. 1954) (Puerto Rican nationalists attempting to oust the United States from its "occupation" of Puerto Rico); *Wilker Bros. Co. v. Lumbermen's Mut. Cas. Co.*, 529 F. Supp. 113 (S.D.N.Y. 1981) and *Ope Shipping Ltd. v. Allstate Ins. Co.*, 521 F. Supp. 342 (S.D.N.Y. 1981) (ships seized during the Sandinista National Liberation Front ouster of Nicaraguan dictator Somoza); *Int'l Dairy Eng'g Co. of Asia Inc. v. Am. Home Assurance Co.*, 474 F.2d 1242 (9th Cir. 1973) (damage to warehoused goods from a parachute flare dropped during the Vietnam war); *Younis Bros. & Co. Inc. v. Cigna Worldwide Ins. Co.*, 91 F.3d 13 (3d Cir. 1996) (damage to supermarkets during the Liberian civil war); *TRT/FTC Comm. Inc. v. Ins. Co. of Pa.*, 847 F. Supp. 28 (D. Del. 1993) (telecommunications equipment stolen during the U.S. invasion of Panama); *Sherwin-Williams Co. v. Ins. Co. of Pa.*, 105 F.3d 258 (6th Cir. 1997) (damage during the U.S. invasion of Panama).

British courts have enforced the exclusions in connection with damage caused by the Spanish civil war and 1916 Easter Rebellion. See *Pesquerias y Secaderos de Bacalao de Espana S.A. v. Beer*, 1 All E.R. 845 (H.L. 1949); *Curtis & Sons v. Mathews*, 2 K.B. 825 (1919).

sions to September 11. The *Pan American* opinion also makes clear that something more than evidence of financial assistance will be required to show that those involved were acting on behalf of a sovereign power in furtherance of war or warlike activities. Courts resolving any such disputes will undoubtedly note that terrorists tried to bring down the World Trade Center towers in 1993 and that carriers had ample opportunity to modify their exclusions to explicitly include acts of terrorism.

C. THE FEDERAL AVIATION ACT

The Federal Aviation Act of 1958¹⁸⁵ authorized the Secretary of Transportation to provide war risk insurance and reinsurance¹⁸⁶ by the United States whenever such insurance was necessary to meet the needs of air commerce of the United States and such insurance could not be reasonably acquired from the private market.¹⁸⁷ American or foreign-flag carriers could purchase insurance or reinsurance to protect against any risk of loss or damage from aircraft operations.¹⁸⁸ The Federal Aviation Act ("the Act") authorized the secretary to insure or reinsure for the reasonable value of the aircraft in keeping with the reasonable aviation market, and only when other insurance could not be obtained under reasonable terms.¹⁸⁹ A critical limitation of the Act was that coverage applied only to aircraft loss or damage occurring either "(A) in foreign air commerce; or (B) between at least 2 places, all of which are outside the United States."¹⁹⁰ The Act, therefore, did not cover domestic flights originating and ending in the United States. Presumably, coverage under the Act would not apply to any of the flights lost on September 11, as they all originated in and were destined to land in the continental United States.

On September 22, 2001, in response to the September 11 attacks, Congress amended the Federal Aviation Act as part of an

¹⁸⁵ 49 U.S.C. §§ 1531-1542 (1958) (current version at 49 U.S.C.S. §§ 44301-44310 (Law. Co-op. 2000 & Supp. 2002)).

¹⁸⁶ "Reinsurance" is an agreement between an insurance provider or primary insurer, and a second insurance company called the reinsurer. The reinsurer agrees to accept a portion of the primary insurer's risk under one or more policies. Reinsurance spreads losses and protects primary insurers from a catastrophic loss or the aggregation of several losses resulting from one single occurrence. See WELLS & CHADBOURNE, *supra* note 36, at 54.

¹⁸⁷ *Pan Am.*, 505 F.2d at 994; MARGO, *supra* note 69, at 235.

¹⁸⁸ 49 U.S.C.A. § 44302(a)(1) (1997 & Supp. 2001).

¹⁸⁹ *Id.* § 44302(a)(2).

¹⁹⁰ *Id.* § 44302(a)(1).

aviation relief package. The Air Transportation Safety and System Stabilization Act of 2001 (ATA)¹⁹¹ was created to “preserve the continued viability of the United States air transportation system.”¹⁹² The ATA addressed airline stabilization, aviation insurance, tax provisions, victim compensation, and air transportation safety.¹⁹³ Title 2 of the ATA expressly amended section 44302 of the Federal Aviation Act.¹⁹⁴ The ATA removed the clause that previously limited coverage only to aircraft involved in foreign commerce or operating outside the United States.¹⁹⁵ Under the revised statute, any American aircraft or foreign-flag aircraft may now purchase United States government insurance or re-insurance, although now the Secretary of Transportation must first acquire approval from the President of the United States.¹⁹⁶ Subsection b of the Federal Aviation Act now allows the secretary, for a limited period of time, to reimburse air carriers for the increase in cost of insurance implicitly arising from the September 11 attacks.¹⁹⁷ Under this provision, the Secretary of Transportation is authorized to reimburse air carriers for the amount by which their insurance premiums increase during their upcoming policy period or through October 1, 2001,

¹⁹¹ Pub. L. No. 107-42, §§ 201-601, 115 Stat. 230 (2001).

¹⁹² *Id.* § 230.

¹⁹³ *See id.* §§ 230-41.

¹⁹⁴ *Id.* §§ 234-36.

¹⁹⁵ 49 U.S.C.S. § 44302(a) (Law. Co-op. January 2002).

¹⁹⁶ *Id.* § 44302(c).

¹⁹⁷ It states:

(1) In general. The Secretary may reimburse an air carrier for the increase in the cost of insurance, with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an American aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001, and ending September 10, 2001, as the Secretary may determine. Such reimbursement is subject to subsections (a)(2), (c), and (d) of this section and to section 44303. (2) Payment from revolving fund. A reimbursement under this subsection shall be paid from the revolving fund established by section 44307. (3) Further conditions. The Secretary may impose such further conditions on insurance for which the increase in premium is subject to reimbursement under this subsection as the Secretary may deem appropriate in the interest of air commerce. (4) Termination of authority. The authority to reimburse air carriers under this subsection shall expire 180 days after the date of enactment of this paragraph [enacted Sept. 22, 2001].

Id. § 44302(b).

whichever date came earlier.¹⁹⁸ The reimbursement would be based on the cost of air carriers' coverage in effect between September 4 and September 10, 2001.¹⁹⁹ The Secretary would have authority to grant the reimbursements for 180 days after enactment of the legislation.²⁰⁰ This period of time, six months, provides air carriers with just enough time to renegotiate contracts with their insurance providers.

This legislation contains an important liability cap specifically for American Airlines, United Airlines, the airports where the terrorists boarded the jets they hijacked on September 11 and the manufacturers of those planes and their component parts. Under the legislation, only federal courts will have jurisdiction in litigation over the liability of those entities.²⁰¹ Any liability imposed on those parties could not exceed their liability insurance coverage.²⁰² Furthermore, any such awards would have to be reduced by court-approved settlements the parties had reached for losses that resulted from the attack.²⁰³ Courts also would be barred from ordering the defendants to pay plaintiffs' punitive damages or pre-judgment interest.²⁰⁴

D. THE FUTURE OF TERRORISM EXCLUSIONS

Most insurers and reinsurers did not insert terrorism exclusions in their policies before September 11.²⁰⁵ Subsequent to the attacks, many reinsurers announced that in the future they would refuse to provide reinsurance coverage for acts of terrorism.²⁰⁶ Without such coverage from reinsurers, insurers will find it very difficult to reserve enough capital designated to cover any future catastrophes caused by terrorist acts.²⁰⁷ Without any government intervention, insurers would have no recourse but to approve a terrorist exclusion within their policies or risk potential insolvency.²⁰⁸ In the absence of Congressional legislation,

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* § 44302(c).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See Auto Insurance Report, *supra* note 20.

²⁰⁶ Letter from the National Association of Insurance Commissioners to "All Property & Casualty Insurers Writing Commercial Lines Insurance Products" (Dec. 21, 2001) (on file with author).

²⁰⁷ *Id.*

²⁰⁸ See *id.*

the National Association of Insurance Commissioners (NAIC) adopted temporary terrorism exclusions.²⁰⁹ The NAIC granted approval to terrorism exclusions drawn equal to or similar to those drafted by the Insurance Services Office (ISO).²¹⁰ These exclusions drafted by the ISO are very broad and seem to apply a very liberal definition of the term "terrorism."²¹¹ For property insurance policies, terrorist exclusions would only apply if the terrorist act resulted in industry-wide losses in excess of \$25,000,000 for related incidents occurring within 72 hours of each other.²¹² For liability insurance policies, terrorist exclusions apply only if the terrorist act causes \$25,000,000 in industry-wide insured losses for related incidents occurring within 72

²⁰⁹ The NAIC adopted a motion stating,

[I]f the Congress adjourns without enacting federal terrorism legislation, the states should grant conditional approval to commercial lines endorsements that exclude coverage for acts of terrorism consistent with the exclusion framework developed by ISO. To the extent permitted by state law, such approvals would sunset or be withdrawn 15 business days after the President signs into law a federal backstop to address insurance losses attributed to acts of terrorism, or be subject to other conditions on the approval consistent with state law.

Id. at 1.

²¹⁰ The ISO approved the use of its copyrighted provisions to any insurer, including those not licensed by the ISO. *Id.* at 2.

²¹¹ Terrorism means activities against persons, organizations or property of any nature:

1. That involve the following or preparation for the following:
 - a. Use or threat of force or violence; or
 - b. Commission or threat of a dangerous act; or
 - c. Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
2. When one or both of the following applies:
 - a. The effect is to intimidate or coerce a government or the civilian population of any segment thereof, or to disrupt any segment of the economy; or
 - b. It appears that the intent is to intimidate or coerce a government or to further political, ideological, religious, social or economic objectives or to express (or to express opposition to) a philosophy or ideology.

Id. at 3.

²¹² Exclusions for acts of terrorism are not subject to the limitations mentioned if: "the act involves the use, release or escape of nuclear materials, or that directly or indirectly results in nuclear reaction or radiation or radioactive contamination; The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials." *Id.* at 2.

hours of each other, or if fifty or more persons are killed or sustain "serious physical injury."²¹³

V. CONCLUSION

The September 11 attacks were not an act of war within the context of insurance and legal application. There was no war being fought at the time of the attacks. The United States was not involved in hostilities with a sovereign or quasi-sovereign government when it suffered the terrorist attacks. Insurers will not be able to deny coverage by claiming a war exclusion defense, assuming they are bold and willing enough to suffer through the public relations nightmare of filing such a claim.

The September 11 attacks were not an act of insurrection, rebellion, revolution, or invasion. The terrorist attacks did not seem to intend to overthrow the government or seize the government's power. This would be the case even if one of the airplanes had succeeded in destroying one or more of America's branches of power. There must have been a violent uprising specifically intended to overthrow the existing powers and to subsequently assume that power. Civil war would necessarily require the occurrence of one of these events. Insurers cannot rely on such terms to avoid September 11 liability.

Many changes will result from September 11. Existing caselaw dealing with war exclusions might not be the norm for future events. Terrorism and war have become one. The lines have been blurred. Terrorism exclusions will become as prevalent as war exclusions in insurance policies. This will result in massive cost increases for the private market unless the United States and other world governments step in and become the ultimate carriers of excess liability and property insurance protection.

²¹³ For purposes of the policies, serious physical injury is defined as: "Physical injury that involves a substantial risk of death; Protracted and obvious physical disfigurement; or Protracted loss of or impairment of the function of a bodily member or organ." *Id.* Furthermore, the exclusions are not subject to the stated limitations if: "the act involves the use, release or escape of nuclear materials, or that directly or indirectly results in nuclear reaction or radiation or radioactive contamination; The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials." *Id.*